No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1997

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., individually and on behalf of its members; PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING COMPANY, A Limited Partnership,

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

ASHTON R. HARDY*
J. MICHAEL LAMERS
JOSEPH C. CHAUTIN, III
Hardy & Carey, L.L.P.
111 Veterans Blvd., Ste 255
Metairie, La 70005
(504) 830-4646

**Counsel of Record*

QUESTION PRESENTED

In this case, the Court of Appeals for the Fifth Circuit rejected the post-*44 Liquormart* rationale of the Court of Appeals for the Ninth Circuit, which struck down a federal ban on the broadcast of advertising concerning lawful casino gaming. Here, the appeals court upheld the same ban. The question presented is:

Whether the federal government may, consistent with the First Amendment, undertake to suppress lawful casino gaming by banning truthful, non-misleading broadcast advertising for such gaming.

RULE 29.6 STATEMENT

The parties to the proceeding in the court below are named in the caption. None of the corporate parties have a parent company or a non-wholly owned subsidiary.

Greater New Orleans Broadcasters Association ("GNOBA"), a non-profit corporation, has filed this document on behalf of its members, which are listed below. None of the corporate members of the GNOBA has a parent company or a non-wholly owned subsidiary.

KMEZ-FM WWL-AM
WLMG-FM\WSMB-AM
1450 Poydras Street
Suite 440
New Orleans, LA 70112

WBOK-AM 1230
Christian Broadcasting Corp.
1639 Gentilly Boulevard
New Orleans, LA 70119

WCKW-FM 92.3
WCKW-AM 1010
222 Corporation
3501 N Causeway Blvd.
Suite 700
Metairie, LA 70002

WDSU-TV Channel 6
Pulitzer Broadcasting Co.
846 Howard Avenue
New Orleans, LA 70113

WBYU-AM
KMEZ-FM
WRNO-FM 99.5 FM
Centennial Broadcasting
201 St. Charles Ave.
Suite 201
New Orleans, LA 70130

WGNO-TV Channel 26
Tribune Broadcasting
#2 Canal Street
New Orleans, LA 70130

WLTS-FM 105.3
WTKL-FM 95.7
Phase II Communications
3525 N. Causeway Blvd
Suite 1053
Metairie, LA 70002

WNOE-FM 101.1
KKND-FM 106.7
KUMX
929 Howard Ave., 2nd Floor
New Orleans, LA 70113

WNOL-TV Channel 38
Quest Broadcasting, Inc.
1661 Canal Street
New Orleans, LA 70112

WVUE-TV Channel 8
Emmis Broadcasting
1025 South Jeff Davis Pkwy.
New Orleans, LA 70125

WWL-TV Channel 4
A. H. Belo Corporation
1024 North Rampart
New Orleans, LA 70116

WQUE-FM 93.3
WODT-AM 1280
WYLD-AM/FM
ClearChannel Communications, Inc.
2228 Gravier Street
New Orleans, LA 70119

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PETITION FOR A WRIT OF CERTIORARI

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The original opinion of the court of appeals (Pet. App. 23a) is reported at 69 F.3d 1296 (5th Cir. 1995). This Court vacated that opinion on October 7, 1996 and remanded the matter for further consideration in light of *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996). *Greater New Orleans Broadcasting Association v. United States*, 117 S. Ct. 39 (1996). The opinion of the court of appeals on remand (Pet. App. 1a) is reported at 1998 WL 429422 (5th Cir.). The opinion of the district court (Pet. App. 42a) is reported at 866 F. Supp. 975 (E.D. La. 1994).

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Federal criminal statute 18 U.S.C. § 1304 (Pet. App. 59a) and Federal Communications Commission ("FCC") regulation, 47 C.F.R. § 73.1211 (Pet. App. 61a), authorize criminal prosecution and administrative sanctions for the broadcast of "any advertisement of or

information concerning any lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or part upon lot or chance . . . ."

STATEMENT OF THE CASE

1. Preliminary statement.

In its recent decision on remand from this Court, the Court of Appeals for the Fifth Circuit upheld the federal government's ban on broadcast advertising for casino gaming. The circuit court's decision directly conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Valley Broadcasting Co. v. United States*, 107 F. 3d 1328 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998). That court held that the same advertising ban violated the First Amendment, as did the United States District Court for the District of New Jersey in *Players International, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997). The decisions of these lower courts are irreconcilable and go to the foundation of the First Amendment's guarantee of free speech. Resolution of such conflicting lower court opinions is a principal purpose for which the Court exercises its certiorari jurisdiction. *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991); *see also*, Sup. Ct. Rule 10(a). Review of the circuit court's decision is vital in order to resolve this important conflict between the circuits pursuant to which the FCC currently bans speech in the southern states while permitting the same speech in other parts of the country.

Review of the circuit court's decision is also essential in order to provide the circuit court and other lower courts with further guidance regarding commercial speech doctrine. In the circuit court's opinion on remand, the panel majority criticized this Court for establishing in *44 Liquormart* what the panel majority called a standard for review of governmental bans on commercial speech "as complex and difficult to rationalize as the statutory advertising regulations the Court has condemned." Pet. App. 3a. Because the panel majority failed to adhere to the Court's guidance in *44 Liquormart*, it also failed to follow the Court's order that it reconsider the government's ban on truthful gaming advertising "in light of *44 Liquormart*...." *Greater New Orleans*, 117 S. Ct. at 39. Instead, the panel majority clung tightly to selected dicta from certain of the Court's prior cases, ignoring the effect of more recent cases, particularly *44 Liquormart* and *Rubin v. Coors Brewing Co.*, 514 U.S. 484, 115 S. Ct. 1585 (1995), on those decisions. The Court should grant this petition in order to further clarify for the appeals court and other lower courts its standard for review of commercial speech bans.

Finally, petitioners believe the Court should take this opportunity to make it clear to lower courts that strict scrutiny should be applied to paternalistic commercial speech restrictions, such as the advertising ban at issue here, that the government imposes to keep consumers ignorant so that it can suppress participation in lawful commercial activities it believes to be undesirable.

2. The Government's advertising ban.

The Greater New Orleans Broadcasters Association ("GNOBA") is a non-profit trade association representing television and radio stations in the New Orleans, Louisiana area in matters affecting the broadcast industry. The remaining petitioners are several GNOBA members (the petitioners are hereinafter collectively referred to as "Broadcasters").

Federal law prohibits Broadcasters from airing advertising for lawful casino gaming. The regulatory scheme enforced against Broadcasters is federal criminal statute 18 U.S.C. § 1304 (Pet. App. 59a) and its corresponding Federal Communications Commission ("FCC" or "Commission") regulation, 47 C.F.R. § 73.1211 (Pet. App. 61a), which Congress enacted as section 316 of the Communications Act of 1934 (the respondents, FCC and United States of America, are hereinafter collectively referred to as the "Government"). The Government may impose monetary forfeitures, broadcast license revocation, criminal fines and imprisonment of up to one year against radio and television broadcasters that violate its ban.

In its present form, the ban is but a wisp of what Congress originally signed into law -- a blanket prohibition on broadcast lottery advertising. What remains of that prohibition is a vague regulatory scheme propped up by obscure, often unpublished rulings and undermined by a hodgepodge of Congressionally-approved exceptions. Those exceptions gut any

remaining vestiges of the ban's purpose and constitutional validity by permitting, and indeed encouraging, what the original regulatory scheme explicitly forbade, namely the broadcast of gaming advertising.

Passage of these exceptions has paralleled a nationwide explosion of all forms of gaming. In 1975, Congress exempted advertising of state-conducted lotteries by stations licensed in states permitting such lotteries. 18 U.S.C. § 1307(a)(1) (Pet. App. 59). Congress passed this exception so that state-conducted lotteries would flourish, and indeed they have; today, thirty-seven states and the District of Columbia sponsor lotteries. In 1988, the Government decided to permit Indian tribes to operate casinos and to encourage broadcast advertising for gaming at those casinos pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*; 47 C.F.R. § 73.1211(c)(3) (Pet. App. 62a). Today, casino gaming is conducted by Indian tribes in more than thirty-three states.

Congress has carved out another exception permitting broadcast advertising of gaming sponsored by non-profit or governmental entities for charitable purposes. 18 U.S.C. 1307(a)(2)(A) (1988) (Pet. App. 60a); 47 C.F.R. § 73.1211(c)(4) (Pet. App. 62a). Fishing contests, sporting events or contests, and occasional and ancillary lotteries conducted by commercial organizations other than casinos all constitute full-blown lotteries under the Government's interpretation of its ban, but broadcasting advertising for

those forms of gaming is also permitted . 18 U.S.C. § 1305 (1950); 1307(d) (1988); 1307(a)(2)(B) (1988) (Pet. App. 59a-60a); 47 C.F.R. § 73.1211 (Pet. App. 62a). Gaming in all of its forms, along with Government-sanctioned broadcasts promoting it, are now part of mainstream America. Some form of legalized gaming is allowed today in forty-seven states. Private, non-Indian casino gaming is legal in twenty-two states.[1]

3. Decisions of the lower courts.

On February 25, 1994 in the District Court for the Eastern District of Louisiana, Broadcasters challenged the constitutionality of § 1304 and § 73.1211, invoking that court's jurisdiction pursuant to 28 U.S.C. § 1331. In opposing the action, the Government presented no evidence justifying the scope or demonstrating the

[1] The ban is no longer enforced nationwide. Broadcasters in the nine most western states, Guam and the Northern Marianna Islands have been free from the ban since September 17, 1997, when the FCC ceased enforcement in response to the decision of the appeals court in *Valley Broadcasting*. FCC Public Notice, 12 FCC Rcd. 13925 (released September 17, 1997). Even before that decision, the FCC granted a blanket waiver from the ban to all broadcasters in Nevada. More recently, the FCC stopped enforcing the ban in New Jersey in response to the district court ruling in *Players International*. FCC Public Notice, 12 FCC Rcd. 22093 (released December 23, 1997). Radio and television stations now exempt from the ban reach roughly twenty-three percent of Americans.

effectiveness of its ban. Nevertheless, responding to the parties' cross-motions for summary judgment, the district court entered a summary judgment in favor of the Government on November 30, 1994. Pet. App. 42a. Broadcasters timely appealed to the Fifth Circuit Court of Appeals, and by a two-to-one vote an appeals court panel affirmed the district court's judgment. Pet. App. 23a. Broadcasters sought review by this Court, which, on October 7, 1996, vacated the decision of the appeals court and remanded the case for reconsideration in light of *44 Liquormart*, which the Court had decided after the circuit court's original decision. On July 30, 1998, the same panel once again affirmed the judgment of the district court by a vote of two-to-one. This latest decision on remand is the subject of this petition.

When it first reviewed the Government's ban, the majority of the circuit court panel recited the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343 (1980), but did not require that the Government justify the ban with evidence.[2] In its first petition for certiorari to this

[2] Central Hudson provides that:

> For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest

Court, Broadcasters criticized the panel majority's failure to require proof of the ban's effectiveness. While that petition was pending, the Court decided *44 Liquormart*, which substantially clarified, if not enhanced, the Government's burden of proof.[3] The Court promptly granted Broadcasters' writ and instructed the circuit court to revisit the matter.

On remand, the circuit court instructed the parties to file supplemental briefs concerning the effect of *44 Liquormart* on the legitimacy of the Government's advertising ban. In its brief, the Government, sensing that it could no longer rely on its prior assertion that it did not need to furnish evidence to support the ban, cited a barrage of non-legal sources for a brand new contention -- that the ban effectively suppressed compulsive gambling. In its opinion on remand, the panel majority correctly found that the Government's new "evidence" raised "numerous fact issues at a belated stage of this litigation." Pet. App. 12a-14a. The

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asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S. Ct. at 2351. The parties have never disputed that the advertising at issue concerns a lawful activity and is truthful and non-misleading.

[3] In *44 Liquormart*, the Court considered a challenge by a liquor store to a Rhode Island statute that forbade advertisements for liquor that featured price information. The state defended the statute as a means of promoting temperance. All nine Justices agreed that the ban violated the First Amendment.

majority also found that "the government's new argument suffers fatally, however, because none of its sources specifically connect casino gambling and compulsive gambling with broadcast advertising for casinos." Pet. App. 14a. But in spite of these findings, the panel majority then proceeded to do exactly what the Government attempted -- on its own notice it cited more unsubstantiated hearsay from newspaper columnists, politicians and other non-legal sources, absolutely none of which even referred to, much less proved anything about, the advertising ban *sub judice*. Pet. App. 11a, n. 9; 12a-14a, n. 10; 14a, n. 11; 15a, n. 12.

In addition, the panel majority repeatedly voiced its dissatisfaction with *44 Liquormart*, claiming that fragmentation of the Court in the case left the lower courts without direction. Instead, the panel majority relied on the Court's earlier decisions in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 487 U.S. 328, 106 S. Ct. 2968 (1986), and *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S. Ct. 2696 (1993), to uphold the Government's ban.

As he did in his original opinion in this case, Chief Judge Politz dissented. Although he believed that *44 Liquormart* failed to provide "a coherent, dispositive framework" for evaluating the Government's ban, he recognized that, at a minimum, *44 Liquormart* made it even more apparent that the ban was unconstitutional, stating:

> Read together, the opinions in *44 Liquormart* teach that the government must use direct methods of controlling disfavored behavior. This, combined with the heavy burden of proof that is now placed on the government, substantially undercuts the validity of laws, such as the statute at issue here, which restrict nondeceptive commercial information.

Pet. App. 21a.

REASONS FOR GRANTING THE PETITION

I. The circuit court's decision creates a direct and irreconcilable conflict between the lower courts centering on the foundation of First Amendment doctrine.

There is only one First Amendment. It is based on principles, not on geography, and it applies to everyone. Chief among the principles that underlie the First Amendment is a conviction that the government of a free people cannot suppress ideas or information solely on the basis of a paternalistic belief that they concern matters the government deems undesirable. The lower courts addressed this fundamental tenet in a manner that simply cannot be harmonized. The Ninth Circuit court defended it, while the Fifth Circuit court abandoned it and in so doing sacrificed the rights of Broadcasters and all other citizens within its jurisdiction. Those citizens now have a materially diminished right to speak vis à vis

the citizens of ten other states. Only this Court can correct the aberration that the Fifth Circuit court's decision has created. Unless reversed by this Court, the Fifth Circuit court's decision will inevitably be cited as an authority for undercutting this and other fundamental principles the Court stressed in *44 Liquormart* and its other recent cases.

II. The panel majority's failure to properly apply *44 Liquormart* makes review by this Court essential.

The panel majority's opinion reflects deep misunderstanding and confusion regarding the effect of *44 Liquormart*. In addition, the conflicting decisions of the circuit courts that have reviewed the ban in light of *44 Liquormart* show that there is potential for inconsistent results in the application of *44 Liquormart*. The Court should grant this petition in order to provide lower courts additional clarification regarding the standard of review that should generally apply to commercial speech restrictions and, in particular, the standard that should apply to a commercial speech restriction, such as the one at issue here, that the government imposes in an effort to suppress an activity that it believes is undesirable.

A. The panel majority's heavy reliance on Posadas *and* Edge *was erroneous.*

At the outset of its opinion, the panel majority made it clear that it would resist the Court's guidance in

44 Liquormart, asking rhetorically, "has the Supreme Court gone over the edge in constitutionalizing speech protection for socially harmful activities?" Pet. App. 3a. The panel majority went on to conclude that "after *44 Liquormart*, what level of proof is required to demonstrate that a particular commercial speech regulation directly advances the state's interest is unclear." Pet. App. 7a. The panel majority seemed to say that, because it believed that *44 Liquormart* was unclear in some respects, the circuit court was free to adopt the legal standard it preferred, namely a *Posadas*-inspired exception to *Central Hudson* permitting wholesale advertising restrictions where such advertising concerned so-called vice activities.

The salient error in this approach lies in the fact that, whatever uncertainty may exist in the relevant jurisprudence after *44 Liquormart*, there is no lack of clarity regarding the invalidity of *Posadas*. Justice Stevens, writing in *44 Liquormart* on behalf of four justices, stated that "*Posadas* erroneously performed the First Amendment analysis" and that the Government "does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." *44 Liquormart*, 517 U.S. at 509-10, 116 S. Ct. 1511. In her concurrence, and on behalf of an additional four justices, Justice O'Connor wrote:

> It is true that *Posadas* accepted as reasonable, without further inquiry, Puerto Rico's assertions that the regulations

> furthered the government's interest and were no more extensive than necessary to serve that interest. Since *Posadas*, however, this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny .... In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored.

Id., 517 U.S. at 531-32, 116 S. Ct. at 1522 (citations omitted).

Thus, insofar as deference to legislative judgment is concerned, *44 Liquormart* could not be more clear. Courts may no longer exercise the deference to what the legislature believes to be reasonable permitted in *Posadas*, and the Government must prove -- with evidence presented in a court of law -- that its commercial speech bans directly and materially advance

substantial governmental interests and are narrowly tailored to do so. But, rather than take the "closer look" that Justice O'Connor discussed, the panel majority clung tightly to *Posadas*, citing that case no fewer than nine times.

1. The panel majority impermissibly relied on* Posadas *as the basis for its conclusion that the Government's ban met* Central Hudson*'s third prong.

Both in *Valley Broadcasting* and in *Players International*, courts reviewing the legitimacy of the Government's ban in the wake of *44 Liquormart* found that the ban failed the third prong of the *Central Hudson* inquiry. Those courts concluded that the ban's conflicting exceptions so completely undercut its effectiveness that it could not directly and materially advance the Government's asserted interest in suppressing public participation in gaming. Here, the panel majority did not even acknowledge the existence of *Players International*, and it quickly brushed aside the conflicting decision of the appeals court in *Valley Broadcasting* -- ignoring the telling significance of this Court's refusal to review that decision -- by simply concluding that the Ninth Circuit court relied on an incorrect reading of *Rubin* when it found that the myriad of inconsistent exceptions to the ban prevented it from materially advancing the Government's asserted interest. The panel majority reiterated its pre-*44 Liquormart* view that, in enacting the ban, the Government made "legitimate, quintessentially legislative choices" that the panel majority would

neither review nor disturb. Pet. App. 33a (original opinion) and 9a (opinion on remand).

The panel majority incorrectly relied upon *Posadas* for its contention that it was right while the *Valley* court was wrong. Citing *Posadas*, the panel majority stated, precisely as it had in its pre-*44 Liquormart* opinion, that proof that the Government's ban directly advances the Government's interests was "evident from the casinos' vigorous pursuit of litigation to overturn it." Pet. App. 32a (original opinion) and 10a (opinion on remand). But *44 Liquormart* explicitly prohibited such reasoning. In that case, Justice Stevens stated that the mere fact that the plaintiffs challenged a speech restriction in no way provided evidence of the restriction's effectiveness. *44 Liquormart,* 517 U.S. at 506, n.16; 116 S. Ct. at 1510, n. 16. Relying on *Posadas* instead of *44 Liquormart*, the panel majority eviscerated the third prong of the *Central Hudson* test, by holding that the Government automatically satisfied *Central Hudson*'s third prong the moment Broadcasters filed a lawsuit to vindicate their rights under the First Amendment.[4]

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[4] Furthermore, the panel majority's reasoning ignored the important fact that, in this case, it is not casinos that challenged the ban, it is Broadcasters, who must compete with other media that are permitted to publish advertising of gaming at private casinos. Given the option, casinos would probably divert a larger portion of their existing advertising budgets to broadcast media. But, that diversion would not necessarily equate with a net increase in gaming advertising and not at all with any increase in

The panel majority also based its belief that the Government had no burden to furnish evidence under *Central Hudson*'s third prong on a mistaken conclusion that "*44 Liquormart* does not disturb the series of decisions that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised." Pet. App. 8a. But, even if it were reasonable to assume that demand for a product would be somewhat lower where advertising for that product was suppressed, "without any finding of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the . . . advertising ban will *significantly* advance the State's interest . . . ." *44* Liquormart, 517 U.S. at 505, 116 S. Ct. at 1509 (emphasis supplied); *see also, Rubin*, 514 U.S. at 487-88, 115 S. Ct. at 1592. Such a conclusion is especially warranted where, as here, there is simply "little chance that [censoring broadcast gaming advertising] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Id.*, 514 U.S. at 489, 115 S. Ct. at 1593.[5] Thus, the panel majority improperly relied upon "speculation or conjecture"

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public participation in gaming.

[5] The failure of the Government to present evidence supporting its ban is particularly telling, given the fact that enforcement of the ban has been suspended in ten states where courts have found the ban unconstitutional. If the ban were truly effective, then its suspension would cause demonstrable harm, but it has not.

regarding the efficacy of the Government's advertising ban. *44 Liquormart,* 517 U.S. at 507, 116 S. Ct. at 1510.

2. The panel majority erroneously relied on* Edge *as the basis for its conclusion that the Government's ban met* Central Hudson*'s fourth prong.

The panel majority attempted to make much of selected dicta in *Edge*. Pet. App. 2a-3a and 17a. There, the Court said that Congress might not have been compelled by the First Amendment to create the exception to the gaming advertising ban that permits broadcasters located in states that operate lotteries to advertise any state-sponsored lottery. *Edge*, 509 U.S. at 428, 113 S. Ct. at 2704. But the fact is, Congress did create this and numerous other exceptions and, in so doing, undercut whatever integrity the advertising ban ever may have had. In addition, unlike the statute the Court reviewed in *44 Liquormart* and unlike the statute under review here, the state lottery exception was designed to regulate advertising only in states where the advertised product was illegal. Thus, *Edge* continues to be a valid precedent after *44 Liquormart*, but only because the advertising at issue in *Edge* proposed a transaction that was illegal in the state where it was broadcast. *44 Liquormart*, 517 U.S. at 509, 116 S. Ct. at 1511. As Justice Stevens cautioned in *44 Liquormart*, *Edge* most certainly does not establish the degree of deference to Congress to which the Government is entitled where it undertakes to suppress speech about

lawful conduct. *Id.* Yet, the panel majority explicitly relied on *Edge* when it held that this Court's cases "[do] not inhibit all legislative flexibility in confronting challenging social developments." Pet. App. 18a. The panel majority's heavy reliance upon *Edge* was misplaced.

Edge is readily distinguishable from this case in another important respect. In *Edge*, the Court upheld the state lottery exception on the basis that it was narrowly tailored to serve an interest in balancing the competing policies of lottery and non-lottery states. *Edge*, 509 U.S. at 435, 113 S. Ct. at 2708. Here, on the other hand, the Government asserted an entirely different interest -- one that is inconsistent with the federalism interest identified in *Edge*. The Government seeks here to protect the interests of the handful of non-gaming states at the expense of the interests of the many gaming states. Thus, the irrationality of the Government's ban is complete. On the one hand, the overall scheme is intended to serve one interest, while on the other hand, a component of the scheme, the state lottery exception, is intended to serve another interest that is mutually inconsistent with the overall purpose of the ban. This is precisely the kind of logical inconsistency that cannot withstand First Amendment scrutiny after *44 Liquormart* and *Rubin*.

***B. The panel majority's treatment of compulsive gambling cannot salvage the Government's ban under* Central Hudson.**

The panel majority acknowledged that, after *44 Liquormart*, "little deference can be accorded to the state's legislative determination that a commercial speech restriction is no more onerous than necessary to serve the government's interests." Pet. App. 10a-11a. The panel majority also acknowledged that the Government's last-minute treatment of compulsive gambling in its supplemental brief on remand was not only procedurally inappropriate, but it was also entirely unavailing, because it failed to establish any connection between broadcast advertising for casino gaming and compulsive gambling. Pet. App. 11a-13a.

But notwithstanding these findings, the panel majority then proceeded to introduce its own research and argumentation regarding compulsive gambling. Pet. App. 11a, n. 9; 12a-13a, n. 10; 14a, n.11; 15a, n.12. Like the Government, the panel majority did not provide the qualifications of any of the sources it cited. Its citations, like the Government's, embodied hearsay in its most objectionable form, and none of them even remotely established a link between broadcast advertising for private, state-regulated casino gaming and compulsive gambling.[6] Surely, the panel majority's

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[6] In fact, the only citation offered by the panel majority that mentioned advertising at all was a quotation

citations are not the kind of evidence of direct advancement and narrow tailoring that this Court requires where the Government deprives certain of it citizens of the right to speak about certain lawful activities.

Even assuming, purely for the sake of argument, that compulsive gamblers are susceptible to broadcast advertising, the current ban is conspicuously ill-suited to shielding compulsive gamblers from it. Broadcasters are encouraged to air advertisements that feature gaming conducted on Indian reservations and are permitted to broadcast advertisements that feature parimutuel betting and other sports betting (*see* Report and Order in MM Docket 83-842, *In the Matter of Elimination of Unnecessary Broadcast* Regulation, 56 Rad. Reg. 2d (P&F) 976, 49 Fed. Reg. 33,264 (1984)), as well as state-operated lotteries. *See* 47 C.F.R. § 73.1211(c)(1) (Pet. App. 64a). Broadcasters may air advertisements that use the word "casino" where it is part of the

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from a newspaper article by William Safire, a popular syndicated columnist, who stated that "many psychiatrists suggest" that "a significant number of gamblers" were encouraged to gamble by casino advertising. Pet. App. 12a, n. 10. The citation did not even refer to broadcast advertising of private casino gaming, which is the only kind of advertising banned by the Government. One can only wonder what Mr. Safire's "many psychiatrists" would think about the efficacy of a ban that singles out one advertising medium and one form of gaming, while allowing compulsive gamblers wholesale access to other gaming information from other media.

advertiser's name, as well as advertisements that convey the atmosphere of casinos and tout the "non-stop Vegas-style excitement" available at casinos. Memorandum Opinion and Order, *In re WTMJ, Inc.*, 8 FCC Rcd. 4354 (Mass Media Bureau 1995). Permissible advertisements for casinos routinely feature images of enthralled casino patrons, as well as flashing lights and other elements of casino decor "that combine to create the ambiance popularly associated with Las Vegas establishments." *Id.* Thus, the Government's ban cannot reasonably be expected to materially advance an interest in preventing or treating compulsive gambling.[7]

The panel majority further stated that Broadcasters "have identified no non-speech-related alternatives to § 1304 as a means of assisting anti-gambling states" in combating compulsive gambling. Pet. App. 17a. This is a remarkable oversight, since Broadcasters' reply brief on remand enumerated seventeen such alternatives. In the first place the

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[7] Even if the Government were able to show that its ban materially reduced compulsive gambling and was narrowly tailored to do so, it would still not satisfy its burden under *Central Hudson*, because the Government's asserted interests are much broader than a limited concern with compulsive gambling. The Government has consistently alleged that its ban serves two interests: suppression of public participation in gaming and backstopping the policies of the handful of states that still prohibit gaming. Nothing in the Government's or the panel majority's treatment of compulsive gambling explains how the ban affects overall public participation in gaming.

Government arguably has the constitutional authority to outlaw gaming, but it has chosen not to do so. In addition, a variety of other approaches to compulsive gambling are available. For example, the Government could easily sponsor or mandate: (1) in- and out-patient treatment programs for compulsive gamblers, (2) prevention and educational programs in schools and communities, (3) crisis and intervention services, (4) referral services, (5) toll-free counseling hotlines, (6) public service announcements in broadcast and other media, (7) training for counselors and other professionals who deal with compulsive gamblers, (8) distribution of informational brochures at casinos, (9) informational and educational displays at casinos, (10) publication of hotline numbers at all casinos and on all casino documentation, (11) development of gambling awareness curricula in concert with educational institutions, (12) distribution of informational and educational videos, (13) informational inserts in governmental employee paychecks, (14) certification programs for compulsive gambling counselors, (15) informational and educational programs for prison inmates, and (16) youth awareness programs. "The ready availability of such alternatives . . . demonstrates that the fit between the ends and means is not narrowly tailored." *44 Liquormart*, 517 U.S. at 530, 116 S. Ct. at 1522 (O'Connor, J., concurring). "It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government's] goal" of preventing and treating compulsive gambling. *Id.*, 517 U.S. at 507, 116 S. Ct. at 1510 (Stevens, J.). The panel majority's

complete indifference to the multitude of alternative means of gaming regulation is a grievous misinterpretation of commercial speech doctrine after *44 Liquormart*. The Court should grant this petition in order to correct that error.

III. The Court's reasoning in *44 Liquormart* supports strict scrutiny of the Government's advertising ban.

The conflict between the courts in *Valley Broadcasting* and *Greater New Orleans* shows that *44 Liquormart* has engendered confusion among the lower courts. The Court should use this case as a vehicle to clarify the guidance the Court offered in *44 Liquormart*, because this case involves precisely the kind of commercial speech restriction that, under any of the opinions furnished by the Court in *44 Liquormart*, contravenes the First Amendment. The Government imposes a total ban on Broadcasters' right to disseminate truthful, non-misleading information about certain kinds of lawful gaming. The ban is not aimed at preserving a fair bargaining process. Instead, its object is entirely paternalistic, namely to suppress the participation of consumers in those certain forms of lawful gaming it targets. Broadcasters respectfully urge the Court to clarify its guidance in *44 Liquormart*, by holding that any commercial speech restriction that serves a paternalistic interest in keeping citizens ignorant of a lawful commercial activity is presumptively invalid and is subject to strict scrutiny under the First Amendment.

When, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 , 96 S. Ct. 1817 (1976), the Court initially extended First Amendment protection to commercial speech, it did so for essentially the same reasons that it protected noncommercial speech. The Court stated:

> There is, of course, an alternative to this highly paternalistic approach [of allowing a government to keep its citizens in ignorance]. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . It is precisely this kind of choice, between the danger of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Virginia State Board, 425 U.S. at 770, 96 S. Ct. at 1829. The Court held that the interests of those who publish commercial speech are as important as the interests of those who hear it: "we may assume that the advertiser's interest is purely an economic one. That hardly disqualifies him from protection under the First Amendment." *Id.*, 425 U.S. at 762, 96 S. Ct. at 1826.

Recent commenters have also suggested that "the commercial/noncommercial distinction makes no sense." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (May 1990). In that article, Judge Alex Kozinski of the Ninth Circuit Court of Appeals concluded that commercial speech should be offered the same level of protection as noncommercial speech, observing that, "in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature." *Id.* at 652. Kathleen M. Sullivan, Stanley Morrison Professor of Law at Stanford University, notes that the compelling reason for protecting core political speech, namely the self-evident interest of incumbent governments in quashing opposition, has application to the protection of commercial speech as well, for although politicians may not compete directly with those in private industry, they do serve constituents, and "to the extent that government is captured by private interest groups, it might well have an incentive to suppress the speech of those groups' competitors." Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123,136-37.[8]

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[8] It is worth noting that the Government's advertising ban exempts advertising for government-operated lotteries of all types. As Sullivan notes, the Court's decision in *Posadas* provided a glaring example of this problem. In that case, Puerto Rico banned advertising

In *44 Liquormart* the Court adhered to the principles underlying *Virginia State Board*, but the three major opinions did so in different ways. Justice Thomas sharply rejected the paternalistic approach supported by the panel majority in this case. He argued that any governmental effort to suppress demand by suppressing advertising is "per se illegitimate," because the government can have no legitimate interest in keeping "users of a product or service ignorant in order to manipulate their choices in the marketplace." *44 Liquormart*, 517 U.S. at 518, 116 S. Ct. at 1515-16. Justice Stevens, joined by Justices Kennedy and Ginsburg on this point, proposed a standard of review which would apply strict scrutiny to commercial speech restrictions, such as the Government's gaming advertising ban, that suppress "dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." *Id.*, 517 U.S. at 501, 116 S. Ct. at 1507.[9] Although, unlike Justice Thomas, Justice Stevens did not find that paternalistic speech restrictions were illegitimate per se, he stated that "special care" must attend any review of "regulations that seek to keep people in the dark for what the government perceives to

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for casinos that competed with the Commonwealth's public lottery, which it advertised freely. *Id.*

[9] Justices Stevens, Kennedy and Ginsburg proposed "less than strict" scrutiny for application to commercial speech restrictions aimed solely at protecting consumers from "misleading, deceptive, or aggressive sales practices." *Id.*, 517 U.S. at 501, 116 S. Ct. at 1507.

be their own good." *Id.*, 517 U.S. at 502-03, 116 S. Ct. at 1507-08. In the third major opinion, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Souter and Breyer, applied *Central Hudson* and invalidated Rhode Island's ban on liquor advertisements, because the state had other methods of suppressing alcohol consumption, such as increased taxation, rationing and conducting educational campaigns, that would "more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers." *Id.*, 517 U.S. at 530, 116 S. Ct. at 1521. Although Justice O'Connor's concurrence suggested that there might conceivably be some paternalistic commercial speech restrictions that would be narrowly tailored enough to survive *Central Hudson*'s fourth prong, Justice Thomas noted that such a law would be hard to imagine, since "it would seem that directly banning a product (or rationing it, taxing it, controlling its price or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test" as Justice O'Connor applied it. *Id.*, 517 U.S. at 524-25, 116 S. Ct. at 1519.

Thus, the three main opinions set forth in *44 Liquormart* treated a paternalistic ban on commercial speech intended to suppress demand for the advertised product in the same way that they might have treated a

ban on ordinary, fully protected speech.[10] As in this case, the government in *44 Liquormart* banned advertising in an effort to suppress consumption of the advertised products. Under ordinary First Amendment analysis, such a ban would have been strictly scrutinized. In their opinions, Justices Thomas and Stevens explicitly supported the application of strict scrutiny. Justice O'Connor, in essence, applied strict scrutiny by finding that the existence of non-speech means of regulation, which are always available, will always cause such a ban to fail *Central Hudson*'s fourth prong.

The error to which the panel majority succumbed in this case, and any remaining confusion after *44 Liquormart*, can be eliminated by removing from the scope of the *Central Hudson* test all commercial speech restrictions that are intended to serve a governmental interest in regulating non-speech commercial activity.

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[10] Justice Scalia, writing separately, expressed discomfort with the *Central Hudson* test, but concurred with Justice Stevens that the restrictions under review could not survive it. It should be noted that, writing for the majority in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538 (1992), Justice Scalia held that even the proscribable forms of expression, such as obscenity and "fighting words," are protected against wholesale content-based restrictions that are unrelated to the reason for the proscription. Here, the Government's ban is not based upon the commercial nature of the speech involved, but on the fact that it refers to gaming. Justice Scalia's holding in *R.A.V.* suggests that such a ban should be subject to strict scrutiny.

Such paternalistic speech restrictions, which "usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth" *(44 Liquormart*, 517 U.S. at 503, 116 S. Ct. at 1508 (citing *Central Hudson*, 447 U.S. at 575, 100 S. Ct. at 2356)), "not only hinder consumer choice, but also impede debate over central issues of public policy." *Id.* (citing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96, 97 S. Ct. 1614, 1620 (1977)). Such restrictions should be subject to strict scrutiny. Under such a standard of review, the Government's gaming advertising ban must certainly fail.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Ashton R. Hardy*
J. Michael Lamers
Joseph C. Chautin, III
Hardy and Carey, L.L.P.
111 Veterans Blvd., Suite 255
Metairie, Louisiana 70005
(504) 830-4646

Attorneys for Petitioners

*Counsel of record

September 1998

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30732

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, ET AL.,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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July 30, 1998

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before POLITZ, Chief Judge, JONES, and PARKER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The Supreme Court remanded this case for reconsideration in light of 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495 (1996). Concluding that 44 Liquormart requires us to revise the Central Hudson[1] analysis in our previous opinion, we amend that opinion but nevertheless affirm the judgment of the district court.

What seemed a fairly straightforward analysis when this panel first considered the constitutionality of the federal statute prohibiting the broadcast of radio and television advertisements for casino gambling, 18 U.S.C. § 1304, has dissolved into a welter of confusion following 44 Liquormart. On one hand, in 1993, the Supreme Court upheld a companion provision that bans some broadcast advertising of state-sponsored lotteries, and five Justices approved the following statement:

> In response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery

[1]Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S. Ct. 2343 (1980).

> advertisements, even by stations in States that have legalized lotteries.

United States v. Edge Broad. Co., 509 U.S. 418, 428, 113 S. Ct. 2696, 2704 (1993). On the other hand, after 44 Liquormart was decided, the Ninth Circuit felt obliged to hold unconstitutional the provision at issue in this case, which bans radio and television advertisements for privately-run casino gambling.[2] Has Edge lost its edge in the succeeding five years? Or on the contrary, has the rule of Edge, become a constitutional mandate? Such that Congress can now ban broadcast advertisements for gambling only in states that prohibit such gambling? Finally, has the Supreme Court gone over the edge in constitutionalizing speech protection for socially harmful activities? The following discussion will suggest that the Supreme Court's jurisprudence has become as complex and difficult to rationalize as the statutory advertising regulations the Court has condemned.[3]

[2]See Valley Broad. Co. v. United States, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998).

[3]See 44 Liquormart, 517 U.S. 484, 116 S. Ct. 1495 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S. Ct. 1585 (1995).

To put the discussion in perspective, it is necessary to review this court's previous application of the Central Hudson balancing test to § 1304. Section 1304 prohibits broadcast advertising of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes depending in whole or in part upon lot or on chance . . . ." This court applied the four-part test set forth in Central Hudson to determine whether § 1304 is a permissible regulation of commercial speech. Central Hudson recognized that truthful, non-misleading commercial speech is entitled to limited protection under the First Amendment. The first two prongs of the test are satisfied here: the casino owners' speech concerns lawful activity and is not misleading, and the government asserts substantial public interests in discouraging public participation in commercial gambling and in assisting states that restrict gambling by regulating broadcasting that is beyond the states' regulatory powers.[4]

The majority and dissent in our earlier opinion parted company over application of the third Central Hudson standard, which inquires whether the advertising ban contained in § 1304 "directly advances the governmental interest asserted." The majority relied on numerous assertions by the Supreme Court that the purpose and effect of advertising are to increase

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[4]See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341, 106 S. Ct. 2968, 2977 (1986) ("We have no difficulty in concluding that the Puerto Rico legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest.").

consumer demand and, conversely, that limits on advertising will dampen such demand. See Edge, 509 U.S. at 433-34, 113 S. Ct. at 2707; Posadas, 478 U.S. at 342, 106 S. Ct. at 2977; Central Hudson, 447 U.S. at 569, 100 S. Ct. at 2353. The majority distinguished the Supreme Court's striking down of a federal prohibition on labeling the alcoholic strength of beer, where the entire legislative scheme represented an "irrational" patchwork and actually approved promotional advertising of stronger alcoholic beverages. Rubin v. Coors Brewing Co., 514 U.S. 476, 486-87, 115 S. Ct. 1585, 1591-92 (1995). The panel's dissent, however, relied heavily on Rubin to emphasize that federal law embodies a ban on advertising various forms of gambling "so pockmarked with exceptions and buffeted by countervailing state policies that it provides, at most, a very minimum support for the asserted interest."[5] Greater New Orleans Broad. Ass'n. v. United States, 69 F.3d 1296, 1304 (Politz, C.J., dissenting), vacated, 117 S. Ct. 39 (1996).

This Court's majority and dissenting decisions also disagreed about the fourth Central Hudson criterion, which analyzes whether § 1304 cabins speech no more than necessary to serve the government's interests. The majority relied on an

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[5]Excepted from § 1304's application are advertisements for (1) fishing contests, 18 U.S.C. § 1305; (2) wagers on sporting events, 18 U.S.C. § 1307(d); (3) state lotteries, Id. § 1307(a)(1), (2); (4) Indian gaming of all types, 25 U.S.C. § 2701; (5) charitable lotteries, 18 U.S.C. § 1307(a)(2)(A); (6) governmental lotteries, Id. § 1307(a)(2)(A); and (7) occasional and ancillary commercial lotteries, Id. § 1307(a)(2)(B).

understanding that this prong of Central Hudson is not a "least restrictive means" test and that it requires only that the regulation's restrictions reasonably fit the desired objective. See Greater New Orleans Broad., 69 F.3d at 1302 (citing Florida Bar v. Went For It, Inc., 515 U.S. 618, 630-31, 115 S. Ct. 2371, 2379 (1995)). The majority then relied on Posadas, a decision which granted deference to the tailoring decision of the Puerto Rican legislature. See Greater New Orleans Broad., 69 F.3d at 1302. In Posadas, Puerto Rico was permitted to ban casino gambling advertising aimed at its residents, while permitting them to be solicited for other wagering games like cock fights. This court's dissenting member believed, however, that the § 1304 broadcast advertising ban is overbroad, because it fails to accommodate the policies of states that have legalized casino gambling. See id. at 1304 (Politz, C.J., dissenting).

After our panel issued its split decision, 44 Liquormart became the Supreme Court's newest pronouncement on the protection of commercial speech under the first amendment. At issue in 44 Liquormart was the constitutionality of a Rhode Island law that banned all advertisement of liquor prices outside the beverage stores' sales premises. The Supreme Court overturned the statute, and while the Court declined to modify the Central Hudson test, it divided over the interpretation of the third and fourth prongs. Justice Stevens, writing for four members, would require Rhode Island to show, for purposes of the third prong, that the statute directly advanced the state's asserted interest in promoting temperance by demonstrating that the advertising ban significantly reduced alcohol consumption. See 44 Liquormart, 517 U.S. at 505-06, 116 S. Ct. at 1509-10. Justice O'Connor, writing for three members of

the court, pointedly declined to adopt Justice Stevens's approach on the third prong. See id. at 529-32, 116 S. Ct. at 1521-22 (O'Connor, J., concurring). Thus, after 44 Liquormart, what level of proof is required to demonstrate that a particular commercial speech regulation directly advances the state's interest is unclear.

The Court was nearly uniform, however,[6] concerning Central Hudson's fourth prong: the justices were willing to scrutinize more carefully whether the state's chosen regulation of commercial speech is closely enough tailored to serve the governmental interests without unduly burdening free speech. In particular, the Court decided, in the context of an outright ban of certain commercial speech,[7] to consider the availability of other, non-speech-related policies or measures that would more directly accomplish the state's purposes. Because the state's asserted goal was to deter price competition, in order to keep prices high and ultimately reduce liquor consumption, the Court pointed out the availability of taxation and minimum price regulation to accomplish that objective directly.

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[6]Justice Thomas would abandon Central Hudson altogether and accord "commercial speech" the full protection of the First Amendment. See 44 Liquormart, 517 U.S. at 518-28, 116 S. Ct. at 1515-20 (Thomas, J., concurring). Justice Scalia, while indicating discomfort with Central Hudson, was not ready to abandon it yet but concurred only in the judgment overturning the statute. See id. at 517-18, 116 S. Ct. at 1515 (Scalia, J., concurring).

[7]No alternative channels were permitted for liquor sellers to publicize the price of their products off-premises.

Eight members of the Court also ruled out the deference to the legislature demonstrated in the Posadas case with respect to restrictions on commercial speech. As Justice O'Connor put it,

> The closer look that we have required since Posadas comports better with the purpose of the analysis set out in Central Hudson, by requiring the state to show that the speech restriction directly advances its interest and is narrowly tailored.

44 Liquormart, 517 U.S. at 531-32, 116 S. Ct. at 1522.

The broadcasters rely heavily on Justice Stevens's opinion in 44 Liquormart. Justice Stevens contended that Rhode Island could satisfy the third Central Hudson prong only on an evidentiary showing that the price advertising ban would significantly reduce alcohol consumption. His approach, however, did not command majority support on the Court and, viewed in the context of that case, does not alter this facet of the Central Hudson standard. The state was using a speech restriction to influence consumption indirectly by affecting liquor prices rather than either using a speech regulation directly to shrink the demand for liquor or by simply regulating its price. The connection between the speech regulation and state policy was not "direct." Indeed, 44 Liquormart does not disturb the series of decisions that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised. See, e.g., Central Hudson, 447 U.S. at 569, 100 S. Ct. at 2353

(finding "an immediate connection between advertising and demand for electricity").

Having sketched both this court's previous opinion and 44 Liquormart, we turn to the remand.

To the extent that the Court's remand provides a general opportunity to reconsider our opinion, it must be noted that the Ninth Circuit in Valley Broadcasting Co. v United States, 107 F.3d 1328 (9th Cir. 1997), agreed with the dissenter in this case and concluded that § 1304 could not materially advance the government's interest in discouraging casino gambling. The Ninth Circuit relied upon an exception in § 1304 that expressly permits broadcast advertising for Indian-operated casino gambling, as well as exceptions that permit similar promotion of state lotteries and local charitable gambling,[8] and found these provisions as inconsistent with the government's asserted interests as the alcohol strength regulation at issue in Rubin. The Ninth Circuit's point derives not from 44 Liquormart, but from Rubin, a decision we distinguished in the prior majority opinion. See Valley Broad., 107 F.3d at 1334-36.

We remain persuaded, for the reasons stated in our previous opinion, that Rubin does not compel the striking down of § 1304. The government may legitimately distinguish among certain kinds of gambling for advertising purposes, determining that the social impact of activities such as state-run lotteries,

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[8]See supra note 5.

Indian and charitable gambling include social benefits as well as costs and that these other activities often have dramatically different geographic scope. That the broadcast advertising ban in § 1304 directly advances the government's policies must be evident from the casinos' vigorous pursuit of litigation to overturn it. See Posadas, 478 U.S. at 342, 116 S. Ct. at 2977 ("[T]he fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.") (citing Central Hudson, 447 U.S. at 569, 100 S. Ct. at 2353). There is also no doubt that the prohibition on broadcast advertising reinforces the policy of states, such as Texas, which do not permit casino gambling. Further, as previously noted, the Supreme Court rejected in Edge the contention that permitting other forms of media to advertise certain types of gambling undercuts the government's policy interests. See Edge, 509 U.S. at 433-34, 113 S. Ct. at 2707; accord Central Hudson, 447 U.S. at 569, 100 S. Ct. at 2353; Dunagin v. City of Oxford, 718 F.2d 738, 747-51 (5th Cir. 1983) (en banc); see also Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1313-14 (4th Cir. 1995), opinion on remand from Supreme Court, 101 F.3d 325 (4th Cir. 1996). We would be acting more out of a hunch that we were wrong on Rubin than compulsion based on 44 Liquormart if we were now to revise our third prong Central Hudson analysis.

After 44 Liquormart, however, the fourth-prong "reasonable fit" inquiry under Central Hudson has become a tougher standard for the state to satisfy. Little deference can be accorded to the state's legislative determination that a commercial speech restriction is no more onerous than

necessary to serve the government's interests. Posadas has been discredited to this extent.

The government still contends, however, that a ban on broadcast advertising for casino gambling is no more extensive than necessary to serve its interests in reducing public participation in commercial gambling and in back-stopping the policies of anti-gambling states. While not limiting its argument to the full scope of social ills historically associated with gambling,[9] the government's remand brief focuses on the broadcast advertising restriction as an effective means to counteract compulsive gambling. Unfortunately, the government's assertions concerning compulsive gambling,

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[9]The social problems encompass rises in organized crime, violence, embezzlement, fraud, see, e.g., Valley Broad., 107 F.3d at 1332, petty theft, employment problems, bankruptcy, depression, suicide, and family troubles, including debt burdens, financial and emotional neglect, abandonment, and divorce, see National Gambling Impact and Policy Commission Act: Hearings on H.R. 497 Before the Comm. on the Judiciary, 104th Cong. (Sept. 29, 1995) [hereinafter 1995 Hearings] (statement of Senator Richard G. Lugar), available in 1995 WL 572923; id. (statement of Congressman Frank R. Wolf), available in 1995 WL 572926; id. (statement of Paul Ashe, President of National Council on Problem Gambling), available in 1995 WL 572924; Blaine Harden & Anne Swardson, Addiction: Are States Preying on the Vulnerable?, Wash. Post, March 4, 1996, at A1; see also Posadas, 478 U.S. at 341, 106 S. Ct. at 2976-77 ("'[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns ... .'").

intuitively sensible though some of them are,[10] raise numerous

[10]See Appellees' Supplemental Brief at 11. Affecting senior citizens, see, e.g., Dan Herbeck, Gambling Stakes Can Be High for Senior Citizens, Buff. News, Feb. 8, 1998, at A1, adults, and children alike, see, e.g., Art Levine, Playing the Adolescent Odds, U.S. News & World Rep., June 18, 1990, at 51, compulsive gambling has been described by the American Psychiatric Association as a "'disorder of impulse control,'" Ruth Benedict, Council Prepares to Treat Compulsive Gamblers, Crain's Det. Bus., Jan. 13, 1997, at 10; see also Harden & Swardson, supra note 9 (noting that Harvard Psychology Professor Howard Shaffer has found that gambling alters the chemistry of the brain and affects the central nervous system much like a drug). Although compulsive gamblers represent a small percentage of the gambling community, they are responsible for a disproportionate share of industry revenue. See Harden & Swardson, supra note 9 (conservative estimate that compulsive gamblers contribute twenty-five percent of casino revenue). Moreover, a recent study by Harvard Medical School concluded that the number of compulsive gamblers living in the United States and Canada is rising, having grown by 1.6 million adults in the last two decades. See Derrick DePledge, Betting the next Roll Wins Study: Gamblers' Odds of Addiction Rising, Fla. Times Union, Dec. 23, 1997, at C1. The study estimated total number of compulsive gamblers at 3.8 million. See id.

Experts attribute these rising numbers to the growing acceptance of gambling within America's entertainment culture, where casinos advertise as family resorts filled with the glamour and allure of easy millions. See id. (quoting Professor Shaffer). Short of prohibiting gambling altogether, limiting broadcast messages about casino gambling may indeed be one of the most effective methods of limiting a compulsive gambler's exposure to a lifestyle that can be as irresistible as it is socially destructive. See, e.g., William Safire, A Gambling Lesson: There's Now a Sucker Born Every Second, Dallas Morning News, June 6, 1998, at 11A ("[M]any psychiatrists suggest[] that a significant number of gamblers . . . were encouraged in their addiction by the lure of casino advertising."); see Harden & Swardson, supra note 9 (noting that the increased availability of gambling is fueling the addiction).

fact issues at a belated stage of this litigation. The government's new argument suffers fatally, however, because none of its sources specifically connect casino gambling and compulsive gambling with broadcast advertising for casinos. If the government's burden were to establish a direct, quantitative evidentiary link among these phenomena, we do not believe it has done so. But 44 Liquormart, though more demanding on

Compulsive gamblers often suffer from financial hardship, emotional difficulties, including alcoholism, depression, stress-related diseases, and suicide attempts. See also Harden & Swardson, supra note 9; Problem Gamblers, Rolling the Dice with their Lives, Buff. News, June 25, 1996, at C1. Moreover, experts estimate that the trouble of each compulsive gambler affects the lives of ten to seventeen people. See, e.g., Gordon Johnson, Everybody Loses, Press-Enterprise, Jan. 25, 1998, at D1. Very often, the gambler's loved ones must endure emotional turmoil, financial neglect, abuse, and divorce. Studies also suggest that children of compulsive gamblers perform worse academically, are more likely to become alcoholics, develop gambling problems themselves, develop eating disorders, experience periods of depression, and attempt suicide. See Appellees Supplemental Brief at 13-14 (citing Douglas A. Abbot et al., Pathological Gambling and the Family: Practice Implications, 76 Fam. Soc. 213, 216-17 (1995); Mark Dickerson, Gambling: A Dependence without a Drug, 1 Int'l Rev. Psych. 157, 162 (1989); Durand F. Jacobs et al., Children of Problem Gamblers, 5 J. Gambling Behav. 261 (1989)). One observer concluded that in some respects, the harm a compulsive gambler inflicts upon his children and his family is really much greater than an alcoholic or drug addict. See Harden & Swardson, supra note 9.

the fourth prong of Central Hudson, does not appear to establish an insurmountable test.

The federal government's policy toward legalized gambling is consciously ambivalent. What began as a prohibition on all interstate lottery advertising has been successively, but gingerly modified to respect varying state policies and the federal government's encouragement of Indian commercial gambling. The remaining advertising limits reflect congressional recognition that gambling has historically been considered a vice; that it may be an addictive activity;[11] that the consequences of compulsive gambling addiction affect

[11]See, e.g., 1995 Hearings, supra note 9 (statement of Paul Ashe, President of National Council on Problem Gambling) (noting that the American Medical Association recognized pathological gambling as an addiction in 1994); see also Harden & Swardson, supra note 9 ("Gambling researchers and psychotherapists agree that the increased availability of legal gambling is fueling increased addiction.").

children, the family, and society;[12] and that organized crime is often involved in legalized gambling.[13]

In both Edge and Posadas, federal and territorial governmental decisions to discourage certain types of gambling, while couched in ambivalence similar to that contained in § 1304, were nevertheless regarded as justifiable. Moreover, in Edge, the restriction on broadcasting by a non-lottery-state station was upheld despite the fact that over ninety percent of the station's listeners lived in a state where the lottery is legal. The Court was persuaded that controlling access to broadcast lottery advertising by thousands of local North Carolina households furthered North Carolina's anti-lottery policy. See Edge, 509 U.S. at 428-30, 113 S.Ct. at 2704-05.

A direct inference from Edge would therefore be that if the federal government may pursue a cautious policy toward the promotion of commercial gambling, then it may use one

[12]See, e.g., 1995 Hearings, supra note 9 (statement of Paul Ashe, President of National Council on Problem Gambling) (noting that the American Medical Association recognized pathological gambling as an addiction in 1994); see also Harden & Swardson, supra note 9 ("Gambling researchers and psychotherapists agree that the increased availability of legal gambling is fueling increased addiction.").

[13]See, e.g., Valley Broad., 107 F.3d at 1332 (discussing hearings before President's Commission on organized crime).

means at its disposal -- a restriction on broadcast advertising[14] -- to control demand for the activity. Further, it may do so even though the restriction will "deprive" the casinos of their opportunity to reach potential customers by one method of advertising in states where they legally operate.

44 Liquormart does not undercut this reasoning. The blanket ban on price advertising there was viewed as too great an imposition on speech because it was (a) comprehensive and (b) an indirect, imperfect tool for manipulating prices compared with alternative direct policies such as minimum prices or taxation.

By these tests, § 1304 cannot be considered broader than necessary to control participation in casino gambling. First, there is no blanket ban on advertising. The ban is more analogous to a time, place and manner restriction. Other media remain available, such as newspapers, magazines and billboards, and indeed broadcast advertising of casinos, without reference to gambling, is permitted. Section 1304 simply targets the powerful sensory appeal of gambling conveyed by television and radio, which are also the most intrusive advertising media, and the most readily available to children. Second, regulation of promotional advertising directly influences consumer demand, as compared with the indirect market effect criticized in 44 Liquormart. Moreover, the efficacy of non-advertising-related means of discouraging casino gambling is purely hypothetical, as such measures

[14]It is postulated that advertising stimulates demand.

would have to compete with the message of social approbation that would simultaneously be conveyed by unbridled broadcast advertising. Section 1304, in short, is tailored to fit the statutory purpose of controlling demand and does not unduly burden speech.

The government also defends the nationwide prohibition of this advertising as necessary to enforce the policies of non-casino -gambling states like Texas. The broadcasters view this restriction as overbroad and assert that only an Edge-like compromise, whereby broadcasters in pro-gambling states could advertise their casinos while non-gambling-state broadcasters could not do so, is constitutionally mandated by the narrow tailoring test. Perhaps the Supreme Court will see it this way; or perhaps the Supreme Court will overrule Edge as inconsistent with its cases in the ensuing five years. But 44 Liquormart does not provide any basis for reaching such results, and the broadcasters have identified no non-speech-related alternatives to § 1304 as a means of assisting anti-gambling states. If § 1304 can be upheld on the basis of protecting the non-gambling states, then it is reasonable for the broadcast ban to be nationwide in effect. As Edge stated, and we earlier noted,

> In response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries.

509 U.S. at 428, 113 S. Ct. at 2704. Central Hudson, as applied after 44 Liquormart, does not inhibit all legislative flexibility in confronting challenging social developments.

Moreover, if this remand opinion is wrong, and § 1304 is invalidated, there will be no federal protection for non-casino-gambling states, and their citizens will be subject to the influence of broadcast advertising for privately owned casinos. This is not a neutral position; it is one that effectively awards federal sanction to an activity that is again coming to be viewed with moral and utilitarian suspicion.[15] Historically, state and local government policies toward legalized gambling have oscillated between prohibition and regulated legalization, as the social problems gambling stimulates have risen and fallen. What is needed is legislative flexibility, so that the people's representatives can respond to the varying consequences of legalized gambling. If court decisions decree unbridled advertising of "truthful, non-misleading speech" however, the legislature's flexibility will be impaired. In the case of gambling, the consequences may be stark: whatever is legal may be advertised; only a prohibition of gambling will justify a ban on advertising. More disturbing, whatever gambling is legal anywhere may be advertised everywhere. No local prohibition of gambling will be meaningful, and communities will be less capable of insulating themselves and their children from the deleterious influence of gambling. Doctrinal rigidity

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[15]See supra notes 9-13.

in this type of case would seem to be the enemy of federalism, of flexible representative government, and of peoples' right to make choices to protect their community and their children. Central Hudson, as applied after 44 Liquormart, does not totally foreclose such flexibility.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

POLITZ, Chief Judge, dissenting:

Having concluded previously that the federal ban on broadcast advertisement of casino gambling fails to satisfy the requirements of Central Hudson,[16] the stricter standard employed by the Supreme Court in 44 Liquormart[17] only strengthens my convictions. Thus, for the reasons assigned in my prior dissent, I must continue to dissent.[18]

The failure of the Justices to reach an agreement in 44 Liquormart about the specifics of the parameters of the constitutional review to be applied to commercial speech restrictions deprives the lower courts of the guidance a coherent, dispositive framework would have provided for evaluating these claims. The divergent analyses unnecessarily blur the boundaries of commercial speech.

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[16]Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980).

[17]44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

[18]Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 69 F.3d 1296, 1303 (5th Cir. 1995) (Politz, C.J., dissenting).

A close reading of 44 Liquormart discloses, however, that a majority of the Court felt strongly that truthful commercial speech about lawful services should enjoy greater first amendment protections than that previously afforded. It appears manifest that the Court will no longer defer to "legislative judgment," grant "broad discretion" for "paternalistic purposes," accept the "greater-includes-the-lesser" reasoning, or defer to the "vice" exception.[19] Read together, the opinions in 44 Liquormart teach that the government must use direct methods of controlling disfavored behavior. This, combined with the heavy burden of proof that is now placed on the government, substantially undercuts the validity of laws, such as the statute at issue here, which restrict nondeceptive commercial information.

If not so viewed previously, it must now be recognized that the statutory advertising proscription at bar herein simply fails to advance directly the government's asserted interests and, accordingly, must be deemed overbroad under the heightened standards of 44 Liquormart. The numerous exceptions and inconsistencies contained in the publication ban abundantly undermine and are adverse to the asserted government interests, precluding the material advancement thereof.[20] In addition, given the many exceptions, the

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[19]44 Liquormart, 517 U.S. 484.

[20]Greater New Orleans Broadcasting Ass'n, 69 F.3d at 1304. See also Valley Broadcasting Co. v. United States, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S.Ct. 1050 (1998) (finding the same ban

government has totally failed to meet its burden of proving that a nationwide ban is mandated.

I respectfully dissent.

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at issue here to violate the first amendment after 44 Liquormart because of the numerous exceptions).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, Et Al.,

Plaintiff-Appellant

v.

UNITED STATES of America and Federal Communications Commission,

Defendants-Appellees

NO. 94-30732

Appeal from the United States District Court
for the Eastern District of Louisiana
Henry A. Politz, Chief Judge.
(CA-94-656-C)

Argued July 11, 1995

Decided November 30, 1995

Before JONES and PARKER, Circuit Judges, and POLITZ, Chief Judge.

Affirmed by published opinion. Judge JONES wrote the opinion, in which Judge PARKER joined and Judge POLITZ dissented.

OPINION

EDITH H. JONES, Circuit Judge:

Greater New Orleans Broadcasters Association (GNOBA) and a group of television and radio stations in the New Orleans metropolitan area (collectively "the Broadcasters") unsuccessfully challenged in district court the constitutionality of a federal statute prohibiting the broadcast of radio and television advertisements for casino gambling. 18 U.S.C. § 1304. While recognizing that the advertisements were entitled to limited protection under the First Amendment, the district court concluded that the governmental interests served by the statute were sufficient to override the First Amendment under the Supreme Court's commercial speech jurisprudence. We affirm.

BACKGROUND

GNOBA is a non-profit corporation organized for the purpose of representing its membership as a trade association in matters affecting the broadcast industry. Each member broadcaster of GNOBA is licensed to a primary place of business in Louisiana. The members want to broadcast advertisements for casino gambling activities, which are licensed and legal in Louisiana and in neighboring Mississippi, but have refrained from doing so for fear of criminal prosecution and sanctions pursuant to 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211, the corresponding FCC regulation.

Section 1304 prohibits broadcast advertising of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance...." 18 U.S.C. § 1304. In February 1994, the Broadcasters filed suit against the United States and the FCC seeking declaratory and injunctive relief permitting them to broadcast gambling advertisements for Louisiana and Mississippi casinos. The Broadcasters first asserted that section 1304 is inapplicable because casino gambling is not a "lottery, gift enterprise, or similar scheme" for purposes of the statute. Alternatively, the Broadcasters contended that section 1304 is an unconstitutional abridgement of their First Amendment free speech rights. The Broadcasters and the government each moved for a summary judgment.

In November 1994, the district court entered summary judgment in favor of the government. Citing *FCC v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), the court concluded that casino advertising falls within the purview of section 1304. The court then determined that under the four-part test set forth in *Central Hudson Gas &*

Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), section 1304 is a permissible regulation of commercial speech. The Broadcasters now appeal from both holdings.

DISCUSSION

[1] The Broadcasters renew their contention that section 1304 does not prohibit advertisements for casino gambling because casino games cannot be considered a "lottery, gift enterprise or similar scheme." However, this argument is foreclosed by Supreme Court precedent. In *FCC v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), the Court held that the three essential elements of section 1304 are 1) the distribution of prizes, 2) according to chance, 3) for a consideration. *Id.* at 290, 74 S.Ct. at 598. Rather than disputing that casino gambling possesses these three essential elements, the Broadcasters ignore this authority entirely.

Instead, the Broadcasters choose to attack the historical underpinnings of the statute in an attempt to demonstrate that the statute was never intended to apply to casino gambling. Apparently, the Broadcasters are laboring under the misperception that this court is free to reject statutory interpretations handed down by the Supreme Court. This we cannot do. As the Broadcasters point out, section 1304 is becoming increasingly riddled with exceptions to its broad application, *see infra* note 4. That legislation has been proposed, and rejected, by Congress which would have excepted broadcast advertisements for casino gambling from

section 1304's reach,[1] reaffirms the Court's broad interpretation of section 1304 in *American Broadcasting*. Therefore, section 1304 is applicable and continues to ban the desired advertising. *Accord Valley Broadcasting Co. v. U.S.*, 820 F.Supp. 519, 524 (D.Nev.1993).

[2] Turning to the constitutionality of section 1304, the proposed advertisements fall within the Supreme Court's definition of commercial speech because they involve "expression related solely to the economic interests of the speaker and its audience" and do "no more than propose a commercial transaction." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976).

[3, 4] "[C]ommensurate with its subordinate position in the scale of First Amendment values," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978), commercial speech is entitled to only limited protection under the First Amendment.

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

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[1]See 134 Cong.Rec. 12,278-82 (1988); 134 Cong.Rec. 31,073-76 (1988).

Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351. Applying the four-part *Central Hudson* test to the facts at hand is the crux of this case.

The first prong, whether the speech concerns lawful activity and is not misleading, is not in dispute. The government concedes that the Broadcasters seek only to broadcast truthful advertising about lawful casino gambling activities. The broadcasters have chosen to center their argument on the second prong--the nature and substantiality of the federal government's interest in prohibiting broadcast advertisements of casino gambling.

[5, 6] The government asserts two interests it contends are substantial. First, section 1304 serves the interest of assisting states that restrict gambling by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate. The second asserted governmental interest lies in discouraging public participation in commercial gambling, thereby minimizing the wide variety of social ills that have historically been associated with such activities. The district court found both of these interests to be substantial. We agree.[2]

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[2]The government may permissibly assert that multiple interests are served by a given statute, only one of which need be substantial. *See, e.g., Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 71-73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983). Further, "the insufficiency of the original motivation does not diminish other interests that the restriction may now serve." 463 U.S. 60, 71-73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469. *Id.* at 71, 103 S.Ct. at 2883. *See also Doe v. Bolton,* 410 U.S. 179, 190-91, 93 S.Ct. 739, 746-47, 35 L.Ed.2d 201 (1973) (a State may readjust its views and

[7] The Broadcasters assault the federal interests in a number of ways. First, the Broadcasters attempt to characterize *United States v. Edge Broadcasting Co.,* ____ U.S. ____, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), as precluding the assertion of any substantial federal interest other than protecting state choice in gambling decisions. *Edge* makes no such broad claim. That case interpreted a companion provision to section 1304, which expressly permits advertising of state-run lotteries by broadcasters in states where the lotteries exist, while prohibiting it by non-lottery-state broadcasters. *Edge* surely determined that the government interest in protecting state choice in gambling decisions is substantial, a holding which applies here. But just as surely, it did not determine the limit of a valid federal governmental interest. *Edge* in no way suggests that the general prohibition on casino gambling advertising was rendered doubtful by the Court's approval of a "state choice" advertising policy for state lotteries. *Edge* supports rather than impairs the constitutionality of section 1304.

[8] Audaciously, the Broadcasters next challenge the federal government's interest in limiting the promotion of certain forms of gambling by means of interstate commerce. The validity as well as substantiality of the federal interest is regulating gambling's interstate manifestations, are, however, as old as the legislation prohibiting use of the federal mails for advertising state-chartered lotteries. Act of July 12, 1876, ch. 186 § 2, 19 Stat. 90, upheld in *Ex parte Jackson,* 96 U.S. 727, 24 L.Ed. 877 (1877). *See also Champion v. Ames,* 188 U.S.

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emphases in light of modern knowledge). Even if one of the government's arguments falters, the other can support the statute.

321, 23 S.Ct. 321, 47 L.Ed. 492 (1903) (*Lottery Case*), sustaining under the commerce clause a federal law prohibiting interstate transportation of lottery tickets. Act of March 2, 1895, ch. 191, 28 Stat. 963. As recently as 1986, this court rejected the argument that changing mores, which have led more states to legalize various forms of gambling, should eliminate the federal interest in prosecuting violations of the federal law prohibiting interstate transportation of lottery paraphernalia. *United States v. Stuebben*, 799 F.2d 225 (5th Cir. 1986). Here the vehicle of commerce is the interstate airwaves and the commerce consists of casino gambling advertisements offered by the Broadcasters. Because Congress has the power to legislate with regard to the use of organs of interstate commerce, it has the power to determine the ends served by that power and whether federal policy will promote or inhibit the states' policies on similar subjects.[3]

[9] The Broadcasters also attack the governmental interest in discouraging public participation in commercial gambling on federalism grounds. They contend that the federal government may not assert an interest in the public's health, safety, and welfare that is contrary to state policy. In other words, the federal government has no interest in discouraging casino gambling if Louisiana has legalized it. This argument

[3]In *The Lottery Case*, Justice Harlan summed up the authorities as holding that "the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government ...; that such power is plenary, complete of itself, and may be exerted by Congress to its ultimate extent, subject *only* to such limitations as the Constitution imposes...." 188 U.S. at 353, 23 S.Ct. at 325-26 (emphasis on original).

is contrary to Supreme Court precedent.[4] The Court has consistently, and recently, noted the federal government's interest in protecting the health, safety, and welfare of its citizens. In *Rubin v. Coors Brewing Co.*, ____ U.S. ____, ____, 115 S.Ct. 1585, 1591, 131 L.Ed.2d 532 (1995), the Court struck down a federal statute prohibiting the display of alcohol content on beer labels. Analyzing the statute under *Central Hudson*, however, the Court found that the federal government's asserted interest, preventing strength wars over the content of alcoholic beverages, was substantial. *Rubin*, ____ U.S. at ____, 115 S.Ct. at 1591. The Court specifically acknowledged that the prevention of alcohol strength wars was aimed at "protecting the health, safety, and welfare of ... citizens...." *Id. See also Bolger v. Youngs Drug Products corp.*, 463 U.S. 60, 72-73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983) (federal government had substantial interest in aiding parents in the upbringing of their children). The Broadcasters have cited no contrary authority, relying instead on an amalgam of general federalism statements.

[10] Taking as valid the federal government's interest in the health, safety, and welfare of its citizens, there remains only to be determined whether the goal of discouraging participation in gambling is substantial. *Posadas de Puerto*

[4]It is also contrary to the weight of authority in the analogous cigarette advertising context. *See Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 584-86 (D.C.D.C. 1971), *aff'd*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972) (upholding constitutionality of U.S.C. § 1335 forbidding cigarette advertising via electronic media).

Rico Assoc. v. Tourism Co., 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), confirms that it is.

Posadas involved virtually identical facts. Although the commonwealth of Puerto Rico licensed and legalized casino gambling, it prohibited advertisements aimed at its own citizens in an attempt to discourage their participation in gambling. Upholding the constitutionality of the advertising prohibition, the Supreme Court's analysis of the second prong of the *Central Hudson* test was perfunctory: "We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." *Id.* at 341, 106 S.Ct. at 2977. Likewise, this court has no difficulty in determining that the very same federal interest is substantial.

[11] The third and fourth prongs of the *Central Hudson* analysis concern the "fit" between the interest asserted and the means employed. Having been unable to dispel the substantial federal interests, the Broadcasters face a much more difficult challenge on the last two parts of the *Central Hudson* analysis They cannot seriously dispute that a prohibition of advertising casino gambling directly advances the governmental interest in discouraging such gambling and fulfills the third *Central Hudson* prong. It is axiomatic that the purpose and effect of advertising is to increase consumer demand. *See Posadas,* 478 U.S. at 342, 106 S.Ct. at 297; *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353. As noted in both *Posadas* and *Edge*, the vigor with which the statute has been challenged confirms the efficacy of the prohibition.

The Broadcasters complain that the various exceptions to section 1304[5] so emasculate the statute as to render it ineffective in advancing the governmental interest, and indeed calls into question the genuineness of the asserted governmental interest. The same type of argument was proffered, and rejected, in *Posadas*, 478 U.S. at 342-43, 106 S.Ct. at 2977 (legislature need not forbid advertising for all games of chance to satisfy third prong of *Central Hudson*). The Court's striking down a prohibition of labelling the alcoholic strength of beer, in *Rubin, supra,* does not change this result. In that case, the Court cited a number of federal laws whose impact on the promotion of stronger alcoholic beverages varies and conflicts, and called the entire scheme irrational. ---- U.S. at ----, 115 S.Ct. at 1592. Because of these conflicts, the prohibition at issue could not achieve its purpose. That situation does not exist here. Congress has singled out particular forms of gaming for which broadcast advertising is permitted, and in so doing made legitimate, quintessentially legislative choices that the social costs of those activities were less than those of casino gambling, or the social benefits, e.g. of state-run lotteries, Indian and charitable gambling, were

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[5]Excepted from section 1304's application are advertisements for 1) fishing contests, 18 U.S.C. § 1305; 2) wagers on sporting events, 18 U.S.C. § 1307(d); 3) state lotteries, 1307()(1), (2); 4) Indian gaming of all types, 25 U.S.C. § 2701; 5) charitable lotteries, 18 U.S.C. § 1307(a)(2)(A); 6) governmental lotteries, 18 U.S.C. § 1307(a)(2)(A); 7) occasional and ancillary commercial lotteries, 18 U.S.C. § 1307 (a)(2)(B).

greater.[6] Needless to say, the statutory prohibition on broadcast advertising also reinforces the policies of states neighboring Louisiana, such as Texas, which do not permit casino gambling.

[12] The Broadcasters nevertheless argue that permitting other forms of media to advertise casino gambling undercuts the government's contention that section 1304 directly advances the asserted interests. This attack was rejected by the Supreme Court in *Edge*, ---- U.S. at ----, 113 S.Ct. at 2707. The Court explained:

> Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced.

Id. *See also Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353; *Dunagin v. City of Oxford*, 718 F.2d 738, 747-51 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 3554, 82 L.Ed.2d 855 (1984) (law prohibiting local liquor advertising directly advances government's interest in

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[6]The alleged underinclusiveness of section 1304 is also advanced by the Broadcasters as a ground for disputing the substantiality of the federal interest, *Central Hudson's* second prong. We reject that attack for the reasons stated above, and note that in *Rubin*, the complexity of the statutory scheme was analyzed as part of the third *Central Hudson* factor. ____ S.Ct. at ____, 115 S.Ct. at 1592.

discouraging liquor consumption despite fact that residents are exposed to liquor advertising from out-of-state sources). Therefore, section 1304 easily satisfies the third prong of the *Central Hudson* test.[7]

[13, 14] The fourth requirement, that the restriction be no more extensive than necessary to serve the government's interest, is also met. This prong of *Central Hudson* is not, as the Fifth Circuit recently observed, a "least restrictive means" test, but requires only that the regulation's restrictions reasonably fit the desired objective. *Moore v. Morales*, 63 F.3d 358, 361 (5th Cir. 1995), citing *Florida Bar v. Went For It, Inc.*, ---- U.S., ----, ----, 115 S.Ct. 2371, 2379, 132 L.Ed.2d 541 (1995). *Posadas* is again compelling. The Supreme Court found it "clear beyond peradventure" that the challenged Puerto Rican law satisfied the fourth *Central Hudson* prong. *Posadas*, 478 U.S. at 343, 106 S.Ct. at 2978. Section 1304 is equally tailored to the asserted governmental interests because it prohibits only broadcast advertising aimed at the promotion of casino gambling. To the extent public demand for casino gambling is reduced by section 1304, one governmental interest is fulfilled. To the extent the broadcasters cannot beam casino gambling advertisements into neighboring states that do not license private casinos, the federal government's goal of assisting states' anti-gambling

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[7]Additionally, Congress is permitted ore intrusive regulation of the broadcast media than other forms of media. *See Turner Broadcasting System, Inc. v. FCC*, ____ U.S. ____, ____, 114 S.Ct. 2445, 2456, 129 L.Ed.2d 497 (1994); *Red Lion Broadcasting Co. v. FCC*. 395 U.S. 367, 388-9, 89 S.Ct. 1794, 1805-06, 23 L.Ed.2d 371 (1969).

policies is fulfilled. No less restrictive alternative seems viable in view of the ability of broadcast signals to cross state borders. In particular, the *Edge* "state choice" policy embodies a compromise that supports states' promotion of their own lotteries. Although Congress could craft a similar compromise for advertising of casino gambling, it has rejected that course, and we do not find it constitutionally mandated.

A final note. In *Edge*, the Court stated that gambling "falls into a category of 'vice' activity that could be, and frequently has been, banned altogether", ---- U.S. at ----, 113 S.Ct. at 2703, and clearly implied that advertising of gambling can lay no greater claim on constitutional protection than the underlying activity. *See also Posadas*, 478 U.S. at 345-46, 106 S.Ct. 2979; *Meyer v. Grant*, 486 U.S. 414, 424, 108 S.Ct. 1886, 1893, 100 L.Ed.2d 425 (1988). In *Rubin*, however the Court distanced itself from this position, ---- U.S. at ---- n. 2, 115 S.Ct. at 1589 n. 2. This is too bad. Drawing a distinction for traditional vice activity, such as gambling or prostitution, would provide a clear constitutional guideline, would free legislatures to make the delicate judgements required when legislating about these activities, and would avoid repetitious litigation over *Central Hudson* in a limited category of cases. Clarity is a virtue seldom attained and too seldom even prized in constitutional law.

CONCLUSION

In summary, section 1304 and the concomitant FCC regulation constitutionally prohibit broadcast advertisements for casino gambling. The statute directly advances the government's substantial interests in discouraging public

participation in such gambling and in enforcing states' anti-gambling policies in a manner no more extensive than necessary.[8] AFFIRMED.

POLITZ, Chief Judge, dissenting:

Persuaded that the values underlying the first amendment commercial speech doctrine compel rejection of a regulatory scheme riddled with such inconsistencies and exceptions as to result in suppression of speech without adequate justification, I must respectfully dissent.

As the Supreme Court has made abundantly clear, the first amendment protects the interest of the listener in the free flow of truthful, non-misleading commercial speech. The doctrine respects the individual's right to information relevant to the making of lawful choices[9] and to the formation and

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[8] *But see Valley Broadcasting Co.*, 820 F.Supp. at 525-27. In *Valley Broadcasting Co.*, the district court struck down as unconstitutional section 1304 finding that it did not directly advance the governmental interest asserted and was more extensive than necessary to serve the governmental interest. For the reasons stated above, we find that under a proper reading of *Central Hudson* and *Posadas*, section 1304 withstands constitutional scrutiny.

[9] *Central Hudson Gas & Elec. Corp. va. Public Serv. Comm'n of New York*, 447 U.S. 557, 562, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980) (rejecting "paternalistic" rationale for suppressing commercial speech in favor of view that people are capable of perceiving their own best interests if well-informed).

expression of opinions regarding governmental regulation of products or activities.[10]

The basis for the protection of commercial speech is not vitiated when the speech concerns lawful but potentially harmful activities, such as alcohol consumption or gambling.[11] When the government would forbid dissemination of information about things which legally may be done, the *Central Hudson* test ought be carefully conducted in order to protect these core first amendment values.

The government seeks to justify a nationwide ban on broadcasts of commercial messages discussing the gambling activities in state-licensed casinos. Given the social ills often associated with gambling, it cannot be gainsaid that the interests asserted in support of this ban are substantial. The *Central Hudson* test, however, requires that the government demonstrate that its interests are *materially* advanced by the ban,[12] and that the ban is no more restrictive than necessary to

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[10]*Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 78, 765, 96 S.Ct. 1817, 1827, 48 L.Ed.2d 346 (1973) ("[T]he free flow of commercial information is indispensable ... to the proper allocation of resources in a free enterprise system ... [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered.").

[11]The Supreme Court recently affirmed that restrictions on speech about legal "vices" are reviewed under the *Central Hudson* standard rather than by a more deferential approach. *Rubin v. Coors Brewing Co.*, ---- U.S. ----, ---- n. 2, 115 S.Ct. 1585, 1589 n. 2, 131 L.Ed.2d 532 (1995).

[12]The "direct advancement" prong of *Central Hudson* is not satisfied by "mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial

serve that interest. Irrational regulatory scenarios in which certain provisions undermine and counteract the asserted government interest do not satisfy the "material advancement" prong of the *Central Hudson* test.[13]

The government claims an independent federal interest in discouraging public participation in commercial gambling. The restriction at bar is the awkward residual of 18 U.S.C. § 1304, originally enacted as section 316 of the Communications Act of 1934 to ban broadcast advertising of gambling. That ban is now deeply gutted by exceptions and in conflict with the policies of many states which have legalized gambling.[14] The broadcasters challenge the regulation to the extent it bans commercial broadcast messages directly referring to legal casino gambling.

A focusing of what can and cannot be done under the challenged regulation appears in order. Casinos are allowed to advertise their existence, to air the word "casino" as part of a legal name, and to refer to the non-gambling amenities within.[15] In instances where state-licensed casino gambling is advertised on billboards and in newspapers, where other legal gambling entities broadcast pro-gambling messages, and where casinos may broadcast their existence and the "excitement" to be had

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speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, ---- U.S. ----, ----, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

[13]*Coors*, ---- U.S. ----, 115 S. Ct. 1592.

[14]An unofficial count reflects at least 21 states.

[15]*See, e.g.*, Letter to DR Partners, 8 F.C.C.R. 44 (1992).

within, I suggest that a faithful application of *Central Hudson* compels the conclusion that the residual ban on broadcasting direct references to the games played in casinos amounts to little more than a gratuitous suppression of expression. Under these circumstances, and given the abundance of broadcast advertising for casinos, the challenged censorship serves little purpose. The government cannot show that this restriction decreases demand for casino gambling to any appreciable extent. While the government is not required, of course, to make progress on every front in advancing its interests, this ban is so pockmarked with exceptions and buffeted by countervailing state policies that it provides, at most, a very minimum support for the asserted interest. I am persuaded that the government has not met its burden of proving material advancement of its interest.

The government also asserts that the ban advances the federal interest in supporting policies of states which have chosen to prohibit casino gambling. Messages banned by the statute cannot be broadcast by any station licensed in the United States. Accordingly, residents of non-casino states cannot receive such messages from broadcasts originating in states where casino gambling is legal. Nor may residents of the casino states.

Recognizing a value in advancing the government's interest in aiding state anti-gambling policies, we must measure the extent of the restriction and weigh countervailing forces. The ban is nationwide. Some states allow casino gambling; some states do not. By not cabining the regulation to radio and television stations in non-casino states, the ban impinges unnecessarily on the policies of states which have legalized casino gambling. A substantial federal interest in protecting

state choice in gambling decisions, by limiting bans on lottery advertising to stations licensed by non-lottery states, was asserted and recognized in *United States v. Edge Broadcasting Co.*[16] The ban at bar is overboard and is inconsistent with the teachings of *Edge*, failing to accommodate the valid federalism interest inherent in supporting the casino-licensing states.[178]

Unlike the statutory scheme upheld in *Edge*, the ban before us allows stations in states where gambling is illegal to broadcast commercial messages promoting a gambling forum in another state, so long as the gambling activities taking place in that establishment are not explicitly referenced.[18] This "policy" simply magnifies the government's failure to prove material advancement of its interest in supporting the policies of non-casino states and guts its argument that a nationwide ban is mandated for an effective insulation of non-casino states from casino advertisements broadcast across state borders.

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[16]---- U.S. ----, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993).

[17]In contrast, *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), presented the issue whether a state's restriction on commercial speech is necessary to a balance of its *own* competing interests, in promoting tourism while protecting its own population.

[18]Federal Communications Commission policy allows a station in a non-casino state to broadcast an advertisement promoting a casino so long as use of the word "casino" is confined to the establishment's proper name and other references to gambling are not explicit. *See, e.g.*, Letter to Calvenar Broadcasting, Inc., 8 F.C.C.R. 32 (1992).

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INCORPORATED, ET AL

VERSUS

UNITED STATES OF AMERICA, ET AL

Civ. No. 94-656
Section "C"

October 31, 1994

ORDER AND REASONS

This declaratory action comes before the Court on motion for summary judgment filed by the plaintiffs, Greater New Orleans Broadcasting association, Inc. ("broadcasters") and cross motion for summary judgment filed by the defendants, the United States of America and the Federal Communications Commission (collectively "FCC"), both parties having agreed that this matter can be determined summarily. Having considered the record, the memoranda of counsel and the law, the Court has determined that the motion of the plaintiffs should be denied and the motion of the defendant granted as submitted.[1]

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[1] However, in light of recent Fifth Circuit jurisprudence and despite the consensus herein, the Court will ask for further advice

Three issues concerning broadcast restrictions on casino advertising are presented to this Court on cross motion: (1) whether a stay of enforcement by the FCC in Nevada violates the equal protection clause; (2) whether prohibitions against the broadcast of certain "lottery" information apply to casino gaming; and (3) whether those restrictions violate the plaintiffs' freedom of speech, due process rights, freedom to contract and equal protection of the law under the First Amendment. These issues largely reflect those presented in Valley Broadcasting v. United States, 820 F.Supp. 519 (D. Nev. 1993), wherein the district court granted summary judgment in favor of broadcasters and struck down the broadcast advertising restrictions imposed by statute and FCC regulations.[2] That decision focused on the First Amendment challenge and found that the FCC prohibitions did not directly advance substantial government interests and were unconstitutionally broad for purposes of the commercial speech analysis set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 446 U.S. 557 (1980).

EQUAL PROTECTION

The plaintiffs' equal protection claim is directed to the decision by the FCC to stay enforcement of the challenged broadcast regulations in Nevada pending appellate review of Valley Broadcasting. The plaintiffs do not dispute the fact that

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regarding the standard applicable to the First Amendment analysis, as explained hereinafter.

[2] An appeal from that decision is pending in the United States Court of Appeals for the Ninth Circuit.

the stay was provoked by the district court decision, that the stay reduces uncertainty for those broadcasters within the state of Nevada or that the stay preserves FCC resources pending appeal. The plaintiffs do argue that because this stay effectively classifies Nevada broadcasters differently than other broadcasters, the plaintiffs have been denied equal protection of the law. The proposed result: a nationwide stay of enforcement pending the appeal of the Valley Broadcasting decision.

The broadcasters ask for application of a strict scrutiny standard to the FCC's decision because it allegedly intrudes on the fundamental right of free speech. This standard would require a compelling interest be served by the FCC restrictions which cannot be served by an alternative and less burdensome means. However, in Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983), the Fifth Circuit specifically rejected the argument that strict scrutiny applies where commercial speech was involved.

> Furthermore, in all cases commercial speech in entitled to only a limited measure of protection under a different standard of review. Under the Central Hudson Gas test, the state must demonstrate a substantial interest which is directly advanced by the regulation. If the right to advertise for profits were fundamental, then parties to any particular commercial speech regulation could rely on a stricter standard of review -- requiring a compelling state interest and necessary means chosen to attain in -- by locating an unregulated class of

advertisers and insisting on an equal protection analysis by the court.

Id., 718 F.2d at 752. The Fifth Circuit continued: "Hence, unlike other areas of First Amendment protection, the commercial speech doctrine is concerned primarily with the level and quality of information reaching the listener." Id. The minimal scrutiny recognized by the Fifth Circuit in commercial speech equal protection cases requires that "the classification challenged need only be rationally related to a legitimate [governmental] interest." Id. 718 F.2d at 753. Without acknowledging Dunigan or this rule, the plaintiffs do alternatively argue that the FCC's stay in Nevada fails even the lesser "rational basis" test.

This Court recognizes the less rational basis standard as applicable to the equal protection challenge made in this matter, and finds that the FCC stay easily meets constitutional muster thereunder. For purposes of the lesser standard, the Court finds that the geographically limited FCC stay was rationally designed to accomplish a legitimate government goal.[3]

In addition, however, the Court finds that the FCC stay survives challenge under the stricter challenge applicable to speech entitled to full First Amendment protection. The allegedly offensive stay and resulting classification were based

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[3] Similarly, the Court finds that the FCC action is not arbitrary, capricious or an abuse of discretion for purposes of review under 5 U.S.C. § 706 (2) (A).

on the order of the district court. Obedience to the orders of the court is surely a compelling interest to all concerned. That obedience is secured by the contempt recognized upon violation. The stay accommodates the broadcasters in the state by providing a measure of certainty of the consequences of any actions. All concerned are spared from the anticipated deluge of individual declaratory actions seeking clarification of the scope of the order which has yet to be declared final.

It is important to note that the stay is temporary in nature and limited in scope. The Nevada district court does not enjoy nationwide jurisdiction; its order is without effect elsewhere. Its order is not final within its jurisdiction until affirmed upon appeal. Yet by virtue of the stay, those within the state of Nevada were served while those persons in all other states, including those states which do outlaw casino gambling, did not have to undergo an unnecessary and perhaps only temporary change of policy. In this regard, it should be noted that the right to unregulated casino advertising was recognized for the first time in Valley Broadcasting. Under the circumstances, the clarity and conservation sought by the government is a compelling interest which could have been accomplished in no other manner that this Court can imagine, and certainly in no other manner suggested by the plaintiffs.

STATUTORY APPLICATION

Next, the plaintiffs argue that casino gaming does not fall within the scope of the statute that empowers the FCC to regulate broadcasted advertising of casino gambling. That statute, 18 U.S.C. § 1304, provides in pertinent part:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be [guilty of an offense against the United States].

[Emphasis added).[4] Specifically, the plaintiffs argue that this statute does not prohibit advertisement concerning casino gambling because casino games cannot be considered a "lottery, gift enterprise or similar scheme."

This argument has yet to receive judicial recognition, failed before the district court in Valley Broadcasting and fails again here. Those things that fall within the coverage of the statute share three characteristics: (1) the distribution of prizes; (2) according to change; (3) for consideration. F.C.C. v. American Broadcasting Co., 347 U.S. 284 (1954). It is clear that all of those characteristics are enjoyed by casino gambling, regardless of the treatment given by any state enactment.

FIRST AMENDMENT

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[4] 47 C.F.R. § 73.1211 is a substantially similar rule being challenged in this matter.

The parties have grounded their First Amendment arguments on the Central Hudson analysis traditionally applied to restrictions on commercial speech.

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566. For purposes of the first factor, there is no dispute here that the proposed speech would concern lawful activity and not be misleading.

Disagreement sharpens on the second prong of the analysis. The FCC contends that the government has a substantial interest (1) in protecting the interest of non lottery states and (2) in reducing participation in gambling and thereby minimizing the social costs associated therewith. The United States Supreme Court summarily recognized these interests in 1993 when it analyzed the right of radio stations in nonlottery states to broadcast lottery information in 1993:

> As to the second Central Hudson factor, we are quite sure that the Government has a substantial interest in

> supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries. As in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), the activity underlying the relevant advertising -- gambling -- implicates no constitutional protected right; rather, it falls into a category of "vice" activity that could be, and frequently has been, banned altogether.

United States v. Edge Broadcasting Co., 113 S.Ct. 2703 (1993).[5]

The plaintiffs maintain that the government interests cannot be deemed substantial because the number and nature of the statutorily recognized exceptions to the ban on lottery advertising have any alleged government interest existed "totally eviscerated." However, this argument leaves this Court without authority to disregard the Supreme Court's recent and clear message recognizing the substantiality of the government interests claimed here and in Edge Broadcasting.

The last two Central Hudson factors involve the consideration of the fit between the ends and the means chosen by the government. Edge Broadcasting advises that the third

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[5] It should be noted that the district court in Valley Broadcasting found that the government had a substantial interest in exercising their commerce clause powers in a manner cognizant of state choices with regard to gambling, but refused to continue to acknowledge the traditional link between gambling and vice without the benefit of the guidance offered in Edge Broadcasting.

factor, whether the regulation directly advances the governmental interest asserted, has a broad focus.

> It is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is advanced directly as applied to a single person or entity. Even if there were no advancement as applied in that manner -- in this case as applied to Edge -- there would remain the matter of the regulation's general application to others -- in this case, to all other radio and television stations in North Carolina and countrywide.

Edge Broadcasting, 113 S.Ct. at 2704. In Edge Broadcasting, the FCC had adopted a policy which permitted licensed broadcasters located in lottery states to broadcast lottery information while prohibiting those located in nonlottery states from such advertising, despite the interstate reach of the airwaves. Again, the Supreme Court found that the FCC regulation directly served the governmental interest in balancing the interests of the lottery and nonlottery states.

Here, the FCC regulations do not prohibit the broadcast of all information concerning casino gambling in Louisiana and Mississippi. Broadcasted advertisement for the state authorized casinos is abundant. The plaintiffs acknowledge that under certain circumstances it is entirely lawful to broadcast casino advertisements. However, advertisements must pertain to the casino's amenities, such as food and rooms. Advertisements cannot promote the gaming aspect of casinos. For instance, under FCC regulations, the word "casino" may be broadcast in

an advertisement only if made part of the name of the establishment, but information about certain contests at casinos cannot be broadcast.

The plaintiffs, however, promote the argument that because casino advertising is presented in other non-broadcast media to persons in Louisiana and Mississippi, the FCC prohibitions are ineffective. However, it is equally clear that casino advertising is presented in broadcast media as well, albeit subject to the specific FCC rules. To the extent that the plaintiffs are arguing against the more intrusive regulation of broadcasting, this Court is mindful of the latest reaffirmation from the Supreme Court.

> The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium.... In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. Red Lion, 395 U.S. at 390, 89 S.Ct. at 1806-1807. As we said in Red Lion, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id., 395 U.S. at 388, 89 S.Ct. at 1806; (other citations omitted).

> Although Courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence.

Turner Broadcasting System, Inc. v. F.C.C., 114 S.Ct. 2445, 2456-2457 (1994). Given the broad scope of this third Central Hudson factor and the continuing validity of enhanced broadcast regulation, the subject restrictions on the advertisement of casino gambling are materially indistinguishable form those which so directly served the government interest in Edge Broadcasting.

The fourth Central Hudson factor does focus on the application of the restrictions in determining whether the regulation is more extensive than necessary to serve the governmental interest. A reasonable fit is required. This requirement is met if the regulation promotes the government interest "provided that it did not burden substantially more speech than was necessary to further the government's legitimate interest." Edge, 113 S.Ct. at 2705, citing, Ward v. Rock Against Racism, 491 U.S. 781 (1989). The validity of the challenged restriction is measured by the relation it bears to the general problem represented by the government interest, not by the extent to which the prohibitions further that interest in an individual case. Id. This Court easily finds that the regulations governing broadcasted casino advertising have been narrowly constructed for purposes of this last factor.[6]

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[6] In this regard, the plaintiffs' motion to strike paragraph four of Greenberg's declaration relating to the interstate nature of

The plaintiffs argue that each of the subject regulations are a "broad-based, undifferentiating, unrestricted total gag." (Rec. Doc. No. 17, p. 40). However, in light of the prohibitions on casino advertising actually imposed, this characterization is simply not accurate. The fact is that broadcasted casino advertising is permitted, limited by the specific gaming-related limitations now imposed by the FCC. In addition, even if the validity of the restriction was to be measured only as to our broadcasters, the presently imposed restrictions effectively advance the governmental interest in a constitutionally narrow manner.

In effect, the objections to the regulations being made by the plaintiff broadcasters were echoed in Edge Broadcasting and dismissed:

> Nor need we be blind to the practical effect of adopting respondent's view of the level of particularity of analysis appropriate to decide this case. Assuming for the sake of argument that Edge has a valid claim that the statutes violated Central Hudson only as applied to it, the piecemeal approach it advocates would act to vitiate the Government's ability generally to accommodate States with differing policies ... Because the approach Edge advocates has no logical stopping point once state boundaries are ignored, this process might be repeated until the policy of supporting [the nonlottery state's] ban on lotteries would be seriously eroded. We are unwilling to start down that road.

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broadcasting lacks merit.

Edge Broadcasting, 113 S.Ct. at 2701.

In sum, the remaining limitations are reasonably fit to the recognized government interest both in design and in scope for purposes of the Central Hudson evaluation. The remaining restrictions imposed by the FCC are minor and constitutionally valid.

APPLICABLE STANDARD

The Court joins the parties in recognizing the application of Central Hudson to the First Amendment analysis herein. It notes that Edge Broadcasting unhesitantly applied that traditional test to the same statute and similar regulations. However, the Fifth Circuit has recently questioned that application in a commercial speech case where content-based restrictions are involved. MD II Entertainment, Inc. v. City of Dallas, Texas, 28 F.3d 492 (5th Cir. 1994). Specifically, the Fifth Circuit referenced R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538 (1992), as questioning the general application of Central Hudson to all commercial speech cases.

The Court recognizes the fact that R.A.V. preceded Edge Broadcasting an that Edge Broadcasting did not rely on R.A.V.'s analysis at all. That is extremely persuasive evidence that Central Hudson is the correct standard here. However, because of the suggestion in MDII, the Court will seek the further advice or consensus of counsel.

Accordingly,

IT IS ORDERED that the Plaintiffs motion to strike paragraph four of Greenberg's declaration is DENIED.

IT IS FURTHER ORDERED that counsel advise the Court **in writing** no later than November 7, 1994, whether issue exists regarding the standard to be applied to the First Amendment analysis.

New Orleans, Louisiana, this 31 day of October, 1994.

UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
BERRIGAN, J.
NOVEMBER 29, 1994

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INCORPORATED, ET AL

VERSUS

UNITED STATES OF AMERICA

CIVIL ACTION NO. 94-656
SECTION "C"

In its previously-issued Order and Reasons, the Court applied the standard set forth by the United States Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission, 466 U.S. 557 (1980) to assess the constitutionality of the subject government regulations under the First Amendment. All parties had previously agreed to the application of the Central Hudson to the First Amendment issues presented herein. Although the Court agreed that the Central Hudson standard was appropriate, it asked for supplemental advice from counsel regarding MD II Entertainment, Inc. v. City of Dallas, Texas, 28 F. 3d 492 (5th Cir. 1994), in which the Fifth Circuit questioned the general application of Central Hudson.

Having further considered the issue, the Court maintains that Central Hudson is the appropriate standard. As previously noted, the Supreme Court did not vary application of that standard in United States v. Edge Broadcasting Co., 113

S. Ct. 2703 (1993), which dealt with the same statute at issue here and which was decided after R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992). Contrary to the plaintiffs' suggestion, the opinion of the Supreme Court in Edge Broadcasting cannot be ignored and is considered sound guidance by this Court.

Further, as noted by the defendants in supplemental brief, the Fifth Circuit itself stated in MD II that Central Hudson continues to govern content-neutral regulations of commercial speech. In so doing, it noted Edge Broadcasting and the appropriateness of the application of Central Hudson therein. Again, Edge Broadcasting involved a challenge to the same statute as at issue here. MD II, 28 F. 3d at 495, fn. 14.

Accordingly, and for the reasons previously issued,

IT IS ORDERED that judgment be entered in favor of defendants and against the plaintiffs dismissing the plaintiffs' claims with prejudice, each party to bear its own costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INCORPORATED, ET AL

VERSUS

UNITED STATES OF AMERICA, ET AL

CIVIL ACTION NUMBER 94-0656
SECTION: "C"

JUDGMENT

The Court having denied the plaintiffs' motion for summary judgment and granted the defendants motion for summary judgment; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, United States of America and Federal Communications Commission and against plaintiffs, Greater New Orleans Broadcasting Association, Incorporated, individually and on behalf of its members, Phase II Broadcasting, Inc., Radio Vanderbilt, Inc., Keymarket of New Orleans, Inc., Professional Broadcasting, Inc., WGNO, Inc. and Burnham Broadcasting Company, a Limited Partnership, dismissing plaintiffs' claims with prejudice, each party to bear its own costs.

New Orleans, Louisiana this 30th day of November, 1994.

UNITED STATES DISTRICT JUDGE

18 USC § 1304

Broadcasting lottery information. - Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in while or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or al of such prizes, shall be fined under this title or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

18 USC § 1305

Fishing Contests. - The provisions of this chapter shall not apply with respect to any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or qualify of fish caught by contestants in any bona fide fishing or recreational event.

18 USC § 1307

Exceptions relating to certain advertisements and other information and to State-conducted lotteries. - (a) The provisions of Sections 1301, 1302, 1303, and 1304 shall not apply to --

(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is --

(A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is --

(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(b) The provisions of Sections 1301, 1302, and 1303 shall not apply to the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law.

(c) For the purposes of this section "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(d) For the purposes of subsection (b) of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by change to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests. For purposes of this section, the term a "not-for-profit organization" means any organization that would qualify as tax exempt under Section 501 of the Internal Revenue Code of 1986

47 Code of Federal Regulations § 73.1211
Broadcast of Lottery Information

(a) No licensee of an AM, FM, or television broadcast stations, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning

any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes. (18 U.S.C. 1304, 62 Stat. 763).

(b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or other thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or other thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question. (See 21 FCC 2d 846).

(c) The provisions of paragraphs (a) and (b) of this section shall not apply to an advertisement, lit of prizes or other information concerning:

(1) A lottery conducted by a State acting under the authority of State law which is broadcast by a radio or television station licensed to a location in that State or any other State which conducts such a lottery. (18 U.S.C. 1307(a); 102 Stat. 3205).

(2) Fishing contests exempted under 18 U.S. Code 1305 (not conducted for profit, *i.e.*, all receipts fully consumed in defraying the actual costs of operation).

(3) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*).

(4) A lottery, gift enterprise or similar scheme, other than one described in paragraph (c)(1) of this section, that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(i) Conducted by a not-for-profit organization or a governmental organization (18 U.S.C. 1307(a); 102 Stat. 3205); or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization. (18 U.S.C. 1307(a); 102 Stat. 3205).

(d)(1) For purposes of paragraph (c) of this section, "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. It does not include the placing or accepting of bets or wagers on sporting events or contests.

(2) For purposes of paragraph (c)(4)(i) of this section, the term "not-for-profit organization" means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

[40 FR 6210. Feb. 10, 1975, as amended at 45 FR 6401, Jan. 28, 1980; 54 FR 20856, May 15, 1989, 55 FR 18888, May 7, 1990].